APPENDIX A

United States Court of Appeals
For the Ninth Circuit

| | | |
|---|---|---|
| United States of America, | ) | |
| Plaintiff, | ) | Nos. |
| | ) | 81-1607X |
| v. | ) | 81-1608X |
| | ) | 81-1609X |
| Michael Warren Coletta, | ) | 81-1610X |
| John A. Wilms, | ) | |
| Herve Bitton, | ) | DC No. |
| Hernan Castro, | ) | CR-81- |
| | ) | 0157-SAW |
| Defendants. | ) | |

[Filed July 29, 1982]

Before: WALLACE and HUG, Circuit Judges,

BROWN*, District Judge.

HUG, Circuit Judge:

Michael Coletta, John Wilms, Herve Bitton, and Hernan Castro appeal their convictions for violations of the

---

* The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

Drug Abuse Prevention and Control Act, 21 U.S.C. §§801-966. Appellants sought dismissal of the indictment because of alleged irregularities in the selection of forepersons for grand juries empaneled in the Northern District of California. They now appeal the district court's ruling that they lack standing to alleged discrimination in the selection of forepersons. Appellants also contend that the failure of the Drug Enforcement Administration to review the controlled substance status of cocaine gave rise to due process violations that required dismissal of the indictment. Two of the appellants claim the district court admitted evidence seized in violation of their fourth amendment rights. Finally, Castro seeks a remand for resentencing, arguing that his constitutional and statutory rights were violated at the sentencing hearing.

# I

## FACTS

The indictment charged the appellants with conspiracy to distribute cocaine. They waived their rights to jury trial, and submitted the case to the district judge on stipulated facts. The stipulations showed that Robert Prezioso, a Drug Enforcement Agency special agent, purchased one ounce of cocaine from Hernan Castro and his cousin, Carlos Castro,[1/] in March, 1981. The Castros advised Prezioso they could provide larger quantities of cocaine. It was agreed that the Castros would arrange for the sale of eight kilograms of cocaine, for which Prezioso would pay $500,000.

On the day of the sale, Prezioso drove with Hernan Castro to a bank, where Castro was permitted to view

---

1/ Carlos Castro was indicted with the appellants. He is not a party to this appeal.

and count the $500,000 in cash. Satisfied with Prezioso's ability to pay, Castro signaled his co-conspirators that Prezioso's partner should be allowed to examine the cocaine. The partner, Drug Enforcement Agency informant Raymond Angelone, went to the Castros' apartment, where he met John Wilms and Herve Bitton. Bitton took Angelone to Michael Coletta's apartment, where Coletta showed Angelone a brown travel bag filled with eight plastic bags of cocaine. Angelone tested the drugs and advised Coletta that he was satisfied with their quality and that the transaction could proceed. Coletta returned the cocaine to the travel bag and zipped the bag. Coletta and Angelone then drove to Coletta's car to the Castros' apartment, where they were to meet Prezioso and complete the transaction.

Angelone's uncontroverted testimony at the suppression hearing was

that as he and Coletta waited, Angelone got into the back seat carrying a second travel bag. Pursuant to his instructions, he unzipped Coletta's bag, and prepared to transfer the cocaine to the empty bag. Coletta insisted Angelone leave the cocaine in his travel bag, and Angelone, leaving both bags unzipped, returned to the front seat.

Wilms approached Prezioso's car, confirmed the presence of the cash, and indicated to Coletta that the exchange could take place. Prezioso then gave surveilling agents an arrest signal, and all four appellants were arrested at the scene.

Based on these stipulated facts, each of the appellants was convicted of conspiracy to distribute cocaine. 21 U.S.C. §§841(a)(1) and 846. A lawful search of Coletta's apartment after his arrest yielded an additional sixteen ounces of cocaine, which resulted

in his conviction for possession of cocaine with intent to distribute. 21 U.S.C. §841(a)(1).

## II

## SELECTION OF GRAND JURY FOREPERSONS

Appellants filed a pretrial motion for dismissal of the indictment on the basis of alleged irregularities in the jury selection process in the Northern District of California. They contended that the procedure employed to appoint grand jury forepersons did not require random selection, but allowed discretion in the choice of a foreperson. Abuse of that discretion was claimed to result in the appointment of a disproportionate number of Caucasian males. Appellants viewed this alleged discrimination as a violation of their

constitutional rights.[2/]

The district court held that the appellants, as Caucasian males, lacked standing to allege discrimination against women and minorities. Further discovery on the issue was precluded, and appellants' request for an evidentiary hearing was denied.[3/] Appellants challenge this preclusion, and seek a

---

[2/] Appellants' motion for dismissal of the indictment included challenges to the composition of both grand and petit juries in the Northern District of California. The district court allowed additional discovery on the jury composition claims. After considering appellants' evidence, it refused to dismiss the indictment. That ruling has not been appealed, and no issue concerning grand or petit jury is before us.

[3/] The Government suggested at oral argument that this ruling did not in fact preclude production of evidence on the issue. Relying on the trial judge's statement that [y]ou may have some standing on other alleged constitutional grounds ....", the Government views the ruling as conditional. It contends appellants were free to submit additional evidence to persuade the judge they did have standing to press these claims, and that their failure to do so bars consideration of the issue now.

[Footnote continued on next page.]

remand for an evidentiary hearing on the issue.

Appellants' challenge to the procedures employed to select grand jury forepersons is based upon Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), in which the Supreme Court held that black defendants who alleged systematic exclusion of blacks from appointment as forepersons of state grand juries stated a claim under the equal protection clause. Appellants understand Rose as authorizing broad challenges to the foreperson selection process by all criminal defendants. In asserting their standing to raise this

---

[Continuation of fn. 3.]

Our examination of the transcript reveals no such waiver. Clearly appellants thought consideration of the foreperson issue was terminated with the ruling on standing. We view the judge's statement as an indication that constitutional grounds other than equal protection might support appellants' foreperson claim, and as an invitation to pursue one of those alternate theories.

claim, appellants rely on Peters v. Kiff, 407 U.S. 493, 504, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972). In that case Peters, a white male, alleged that the grand jury that indicted him and the petit jury that convicted him were empaneled under procedures that excluded blacks. The Court held Peters had standing to state these claims: "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race ...."

Appellants' theory, that Peters grants them standing to seek dismissal of their indictment under Rose, fails to distinguish the constitutional bases of these two cases. The Peters defendant alleged a due process violation. In concluding that Peters, a white male, had standing to challenge exclusion of blacks from grand and petit juries, the Court

reasoned that the exclusion of a discernible class from jury service injured not only the specific defendant, but the integrity of the jury system. Due process was violated if the jury failed to reflect "a representative cross section of the community." 407 U.S. at 500, 92 S.Ct. at 2167. The irregularities in jury selection thus threatened injury to Peters's personal rights under the due process clause.

In contrast, the defendants in Rose alleged that discrimination against their race in selection of foreperson violated their rights under the equal protection clause. Their claims implicated not only general societal interest in the integrity of the judicial system, but also a "personal constitutional right" not to be subject to irrational and discriminatory classifications. Rose, 443 U.S. at 561-62, 99 S.Ct. at 3003, contrasting

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). In order to enforce that right, each defendant was required to "show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." Id. at 565, 99 S.Ct. at 3005, quoting Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977) (emphasis added). Rose, applying a traditional equal protection analysis, thus holds that in order to assert an equal protection claim plaintiffs must be members of the excluded group. See Alexander v. Louisiana, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972) (Black male's allegation of exclusion of blacks from grand jury states equal protection claim; allegation of exclusion of women distinguished); Hernandez v. Texas, 347 U.S. 475, 477, 74 S.Ct. 667, 669, 98 L.Ed. 866 (1954)

("denial of equal protection ... to try a defendant of a particular race or color under an indictment issued by a grand jury ... from which all persons of his race or color have ... been excluded."). But see United States v. Perez-Hernandez, 672 F.2d 1380, 1386 (11th Cir. 1982) (membership in excluded group not required to bring equal protection claim).

Appellants have not shown that any group of which they are members has been excluded from the foreperson selection process. They have experienced no injury to their personal rights to equal protection, and they lack standing to assert the equal protection rights of the women and minorities who may have been excluded. Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1974); Halet v. Wend Investment Co., 672 F.2d 1305, 1308 (9th Cir. 1982).

Under Peters, these appellants

do have standing to challenge the selection procedures as due process violations. We conclude, however, that appellants' allegations are insufficient to state a claim under the due process clause. Perhaps under some circumstances systematic discrimination in the appointment of grand jury forepersons would so imperil the integrity of the jury system that the resulting indictments and convictions would be fundamentally unfair. However, these appellants have failed to suggest how the selection of one person, serving on a correctly constituted panel, could have a significant impact on the basic fairness of the process.

Appellants have no standing to challenge the selection of forepersons as an equal protection violation. Their allegations are insufficient to imply a due process violation. The district court was correct in denying their motion

to dismiss.

III

CLASSIFICATION OF COCAINE

The Drug Abuse Prevention and Control Act, 21 U.S.C. §811, authorizes the Attorney General to review the classification of substances listed in section 812 of the Act. Where consideration of scientific and medical evidence and evaluation of drug abuse factors suggest to the Attorney General that a drug is misclassified, he may promulgate regulations to remove a drug from the classification schedules or to move it from one schedule to another. Section 841 of the Act specifies the penalties prescribed for drug offenses in terms of the drug's classification under section 812. It is appellants' theory that the interplay of these provisions renders the indictment under which they were charged constitutionally infirm. The district court correctly refused to

dismiss the indictment on this basis.

By moving a controlled substance from one schedule to another, the Attorney General necessarily alters the penalties that result from unlawful possession or distribution of that substance. Appellants view this as an unconstitutional delegation of legislative authority, in that administrative officials may determine the consequences of statutory violations. This court recently considered and rejected that argument. United States v. Alexander, 673 F.2d 287, 289 (9th Cir. 1982).

Next appellants contend that the Attorney General's failure to reclassify cocaine or remove it from the section 812 schedules constitutes an abuse of discretion and renders the penalty for cocaine offenses unconstitutionally vague. Even if we were to assume that, as appellants argue,

scientific evidence supports the reclassification of cocaine, that evidence would not mandate reclassification. Removing a substance from its section 812 schedule requires consideration of, inter alia, the drug's effect on the public health and its potential for abuse. Section 811(c). In view of these factors, the failure to reclassify cocaine is neither irrational nor an abuse of discretion. Alexander, 673 F.2d at 288.

Because of our conclusions here and in Alexander, the district court's refusal to consider the scientific evidence proffered by appellants or to hold an evidentiary hearing was not error.

IV

SEARCH OF TRAVEL BAG

Coletta was arrested as he sat in his car waiting for the exchange of the cocaine for the money. As the Drug

Enforcement Agency officers approached the car, Coletta started the engine. Agent Prezioso instructed Coletta to stop the car, arrested him, and removed him from the vehicle. Prezioso then reached into the back seat and seized two travel bags. One bag, placed in the car by Angelone, was empty. The other, Coletta's travel bag, contained the eight kilograms of cocaine.

Coletta contended Prezioso's warrantless entry into the vehicle and removal of Coletta's bag constituted an unlawful search and seizure. He sought suppression of the cocaine. After an evidentiary hearing, the district judge denied the motion. Although no findings were made, the denial appears to have been based on the application of the plain view doctrine.

Agents Prezioso and Plattos, as well as the informant, Angelone, testified at the hearing that Coletta's

bag was partially unzipped and its contents visible. Coletta testified that before leaving his apartment, he covered the cocaine with a towel and zipped the bag shut. He also stated that as he waited for the exchange, he transferred the bag from the back seat to the car's rear floor, so that the cocaine would not have been in plain view. It would appear that implicit in the district judge's denial of the suppression motion was a finding that he believed the testimony of the agents and Angelone and discredited that of Coletta. This credibility determination will not be disturbed on appeal. See United States v. Harrington, 636 F.2d 1182, 1185 (9th Cir. 1980) (denial of suppression motion to be upheld if reasonable view of evidence supports it).

In addition, the Supreme Court recently held that the warrantless search of a vehicle and search and seizure of

its contents are lawful where officers have legitimately stopped the vehicle and they have probable cause to believe it contains contraband. United States v. Ross, ___ U.S. ___, ___, 102 S.Ct. 2157, 2173, 72 L.Ed.2d ___ (1982). Because the agents had probable cause to arrest Coletta, their stop of his vehicle was legitimate. Agent Prezioso had been informed by Castro that they would be met at the Castros' apartment by the suppliers, who would have the cocaine. He observed Coletta and Angelone in Coletta's car. After Wilms confirmed to Coletta the presence of the money, Prezioso turned the money over to Castro and was instructed by Castro to walk to Coletta's car to complete the exchange. Without question, these facts provided probable cause to believe the cocaine was in the car and therefore justified the warrantless search of the car. In addition, the remaining requirements

imposed by Ross are satisfied. The officers anticipated that the drugs would be in Angelone's bag, rather than Coletta's; therefore, probable cause to search was not limited to a specific container. Id at ___ & n.22, 102 S.Ct. at 2168 & n.22. The bag was of such a size and shape that it was likely to contain the drugs. Id. at ___, 102 S.Ct. at 2169. The search and seizure of the bags were lawful, and the district court correctly denied the motion to suppress.[4/]

---

[4/] At oral argument before this panel, Coletta suggested that Ross requires that the search be incident to arrest, relying on United States v. Cleary, 656 F.2d 1302 (9th Cir. 1981), vacated, ___ U.S. ___, 102 S.Ct. 2919, 72 L.Ed.2d ___ (1982) (remanded for consideration in light of Ross). At the time of arrest, agents looked into the bag and reasonably concluded it contained cocaine. In our view, that examination comprised the challenged search, rather than the thorough examination and analysis of the drug made later at Drug Enforcement Agency headquarters. We therefore need not consider whether Ross authorizes only searches made incident to an arrest.

V

SEARCH OF BITTON'S APARTMENT

Following appellants' arrests, a warrant was issued for the search of Bitton's apartment. Bitton claimed that the agents requesting the warrant had failed to establish a nexus between Bitton's home and the crime with which he was charged. Because of this failure, he reasoned there was not probable cause to believe that the drugs and drug paraphernalia listed in the warrant could be found in Bitton's apartment. He contended this lack of probable cause required invalidation of the warrant and suppression of all evidence seized in the apartment. The district court denied the suppression motion.

This court does not review motions to suppress as abstract legal theories divorced from the facts of the case. When Bitton's legal argument is tied to the pertinent facts, its lack of

merit is patent. Before this court, Bitton identified only one specific item of evidence seized from his apartment: a packing carton for a pistol. This item is totally without evidentiary significance.[5/] Bitton stipulated that he was carrying a pistol on the day of the transaction, and there was more than ample evidence of Bitton's participation in the conspiracy. The district court's failure to suppress this evidence, if erroneous, was harmless beyond any doubt. See United States v. Hackett, 638 F.2d 1179, 1186 (9th Cir. 1980), cert. denied, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981); United States v. Gulma, 563 F.2d 386, 390 n.3 (9th Cir. 1977). We therefore need not consider Bitton's

---

[5/] Bitton was indicted for violation of 18 U.S.C. §924(c)(1), in addition to the conspiracy charge. The count alleging use of a firearm was dismissed. Even if Bitton had been prosecuted on that charge, the evidentiary value of the packing carton is difficult to perceive.

challenge to the warrant.

VI

REFUSAL TO CONTINUE SENTENCING

Following the verdicts, Castro discharged his trial attorney, who had failed to secure Castro's release on bail pending sentencing. The new attorney, appointed September 8, moved on September 18 for a two-week continuance of the sentencing, then set for September 23. The attorney did not interview Castro prior to September 23. He stated at the sentencing hearing that he was unfamiliar with Castro's background and the facts of the case, and that he had not seen the presentence report.

The district court denied the motion for a continuance and proceeded with sentencing, after assuring Castro's attorney that the court would be receptive to a motion for modification of judgment, if the attorney's review of the

case uncovered grounds for such a motion. The judge instructed the probation department to make the presentence report available. The attorney agreed that this procedure was "satisfactory."

Castro now claims denial of a continuance violated due process, his right to counsel, and the requirements of Fed.R.Crim.P. 32(c)(3)(A). He seeks a remand for resentencing.

Castro alleges Fed.R.Crim.P.32(c)(3)(A) was violated because his attorney did not see the presentence report prior to sentencing. That rule provides in Part:

> Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presence investigative exclusive of any recommendation as to sentence, ...; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the

presentence report.

The court is required to disclose the report only if the defendant requests disclosure. United States v. Winn, 577 F.2d 86, 92 (9th Cir. 1978). Castro's attorney made no such request prior to the sentencing hearing. His inability to review the report thus resulted from his own failure to act, not from the judge's refusal to grant a continuance. Fed.R.Crim.P.32 was not violated.

Castro claims that the result of the denial of a continuance was to render his attorney unable to effectively comment on the report, thus depriving Castro of his rights to counsel and due process. The due process clause does not require disclosure of the presentence report. Williams v. New York, 337 U.S. 241, 249-51, 69 S.Ct. 1079, 1084-85, 93 L.Ed. 1337 (1949). Due process does require that the sentencing judge listen

to and fairly consider information material to mitigation of punishment. United States v. Doe, 655 F.2d 920, 927 (9th Cir. 1981); see also United States v. Wolfson, 634 F.2d 1217, 1221-22 (9th Cir. 1980). Castro has not demonstrated that the procedure adopted by the district court failed to satisfy this requirement. Both Castro and his attorney were given an opportunity to address the court prior to sentencing. Castro does not question the judge's assurance that he would consider mitigating evidence submitted after sentencing. Nor does he suggest that the report contained unfair or unsupported allegations. See United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061, 92 S.Ct. 748, 30 L.Ed.2d 749 (1972) (information in presentence report must be sufficient to be persuasive of validity of charges made in report). We

therefore conclude that the judge's refusal to grant a continuance, especially in view of the procedure he adopted, did not threaten any of Castro's constitutionally protected interests.

Each of the convictions is AFFIRMED.

APPENDIX B

United States Court of Appeals
For The Ninth Circuit

| | | |
|---|---|---|
| United States of America, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Nos. |
| v. | ) | 81-1607X |
| | ) | 81-1608X |
| Michael Warren Coletta, | ) | 81-1609X |
| John A. Wilms, | ) | 81-1610X |
| Herve Bitton, | ) | |
| Hernan Castro, | ) | D.C. No. |
| | ) | CR-81- |
| Defendants. | ) | 0157-SAW |
| | ) | |

[Filed September 2, 1982]

ORDER

Before: WALLACE and HUG, Circuit Judges, BROWN*, District Judge.

The panel, as constituted in the above case, has voted to deny the petition for rehearing.

The petition for rehearing is denied.

* The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, citting by designation.

§ 811. Authority and criteria for classification of substances —Rules and regulations of Attorney General; hearing

(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed;

or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

Evaluation of drugs and other substances

(b) The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation of recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

**Factors determinative of control or removal from schedules**

(c) In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

**International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances**

(d)(1) If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this

title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(2)(A) Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health, Education, and Welfare who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The Secretary of Health, Education, and Welfare shall prepare for transmission through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

(B) Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State shall

transmit timely notice to the Secretary of Health, Education, and Welfare of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish, pursuant to this subparagraph, respecting such proposal. The Secretary of Health, Education, and Welfare shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United Sates in discussions and negotiations relating to the proposal.

(3) When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention on Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this subchapter to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetics Act do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health, Education, and Welfare, after consultation with the Attorney General, shall first determine whether existing legal controls under this subchapter applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetics Act, meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

(A) If such requirements are met by such existing controls but the Secretary of Health, Education, and

Welfare nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsections (a) and (b) of this section, to apply to such controls.

(B) If such requirements are not met by such existing controls and the Secretary of Health, Education, and Welfare concurs in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

(C) If such requirements are not met by such existing controls and the Secretary of Health, Education, and Welfare does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall—

(i) if he deems that additional controls are necessary to protect the public health and safety, recommend to the Attorney General that he institute proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;

(ii) request the Secretary of State to transmit a notice of qualified acceptance, with the period specifiled in the Convention, pursuant to paragraph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

(iii) request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of

the United Nations, in accordance with paragraph 8 of article 2 of the Convention, of the scheduling decision; or

(iv) in the case of a schedule notice, request the Secretary of State to take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice.

(4)(A) If the Attorney General determines, after consultation with the Secretary of Health, Education, and Welfare, that proceedings initiated under recommendations made under paragraph (B) or (C)(1) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirements of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State

to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective date of the application to the drug or substance of the controls resulting from such proceedings.

(B) After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a schedule notice, the Attorney General, after consultation with the Secretary of Health, Education, and Welfare and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry ou the United States obligations under paragraph 7

of article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C)—

(i) the decision is reversed, and

(ii) the drug or substance subject to such decision is not required to be controlled under schedule IV or V to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention.

the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision. If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken with respect to such drug or substance under the Convention.

(C) An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 312(b) of this title and without regard to the procedures prescribed by subsection (a) or (b) of this section.

(5) Nothing in the amendments made by the Psychotropic Substances Act of 1978 or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health, Education, and Wel-

fare or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review of scheduling decisions under such Convention, based on new or additional information.

Immediate precursors

(e) The Attorney General may, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation. If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors.

Abuse potential

(f) If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

Non-narcotic substances sold over the counter without a prescription: dextromethorphan

(g)(1) The Attorney General shall by regulation exclude any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic

Act, be lawfully sold over the counter without a prescription.

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this subchapter unless controlled after the date of such enactment pursuant to the foregoing provisions of this section.

§ 812. Schedules of controlled substances—Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

§ 841. Prohibited acts A—Unlawful acts.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000,

or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person, shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000,

or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(e)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or subchapter III of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Piperidine offenses and penalty

(d) Any person who knowingly or intentionally—

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

§ 877. Judicial review

All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.